*Dyson*[3] which is reproduced in the judgment of Seah, S.C.J. It is where the holder of the equity is said to have been induced to act to his detriment in the expectation of retaining possession for as long as the period that the law may allow. Thus the golden thread that runs through all the main cases decided by our courts in enforcing a lease void for non-registration is the "expenditure element" incurred by the tenant in expectation of a long lease.

In *Margaret Chua* v. *Ho Swee Kiew & Ors.*[11] the proprietor of the premises borrowed money from the would be tenants and agreed to grant a lease and also agreed not to dispose of the premises without giving the tenants the option to purchase the premises. Similarly in *Siew Soon Wah & Ors.* v. *Yong Tong Hong*[1] the tenant paid the landlord $8,000/– as consideration for permanent tenancy and the Privy Council said that the tenant had paid $8,000/– for a long tenancy and there arose an equity or equitable estoppel protecting the tenant's occupation for the maximum period permitted by law, *i.e.* 30 years.

I do not think *In re King's Leasehold Estates*[2] should be applied here because there the railway company, desiring to use the premises, entered into an agreement with John King to purchase the interest claimed by him in the premises and contracted to pay £470 for the interest. John King then delivered to the railway company a copy of the agreement executed by Thomas Warren and Charles King referred to earlier. The railway company thereupon alleged that according to the true construction of the agreement John King was a tenant from year to year only and had no other interest in the premises. I think crucial in the decision making process in that case was the question raised by Sir R. Malins V.C. at page 525:–

"First of all this is not an arbitration, but a deliberate agreement entered into by the tenant King of the one part and the railway company, by Mr. Clifton, their agent, of the other part, and I must assume that the company knew the nature of the interest when the contract was entered into, and they deliberately contracted to pay him £470 for that interest. They come now and say that he had no interest whatever. I think that is not open to them, but if it was open to them, can they with propriety say it?"

In a case of this nature, I would endorse fully what Ong C.J. said in the Federal Court in *Siew Soon Wah*[1] at page 107:–

"Every case must, of course, be decided according to its peculiar facts. *The distinction must be drawn between cases where the tenant can resist his landlord's claim on equitable grounds and others where he has no such grounds.* An example is *Lee Ah Low* v. *Cheong Lip Kien* (1970] 1 M.L.J. 7) a recent decision of this court. There the tenant was given a tenancy for 80 years during which period the landlord agreed not to increase the rent unless the assessment rate was raised by the Municipality and the tenant was at liberty to use the premises for carrying on any type of business. The monthly rent was $100 and the tenant was given a month's notice to quit. *No equity had been created in his favour,* as in *Inwards* v. *Baker* ([1965] 2 W.L.R. 212, 213) by his going into possession. Accordingly the sole question to be determined was whether the premises were held under a yearly or monthly tenancy by reason of the lease being void for non-registration."

(emphasis provided)

The conclusion is therefore very simple. Since the respondents here had failed to show that an equity had been created in their favour what becomes evident from the undisputed facts is a monthly tenancy terminable with one month's notice.

I agree therefore with my learned brother Datuk George Seah S.C.J. that the appeal should be allowed with costs here and below.

*Appeal allowed.*

Solicitors: *Arifin & Partners; Gill & Tang.*

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## WISMA PUNCA EMAS SDN. BHD. v. DR. DONAL R. O'HOLOHAN.

**[S.C. (Wan Suleiman, Seah & Wan Hamzah S.C. JJ.) March 6 & October 18, 1986]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 109 of 1985]**

*Torts – Nuisance – Cause of action founded on natural right of support – Statement of claim based on negligence – Nuisance not specifically pleaded – Defendants not prejudiced – Judgment given for actionable nuisance – Appeal dismissed.*

*Practice and Procedure – Pleadings – Whether parties bound by their pleadings – Negligence – Nuisance – R.H.C. 1980, 0.20 r.5.*

In this case the appellant and respondent were registered owners of adjoining landed properties in Seremban. As a result of development works carried out on the appellant's land the respondent took out a writ against them claiming *inter alia,* damages and also prayed for an injunction. The case against the appellant was summed up in the statement of claim as follows: "The indiscriminate excavation and removal of earth, stone and clay from the defendants' property without ensuring sufficient support for the adjoining properties and without taking sufficient precautions and providing adequate support or otherwise has

caused the surrounding areas to be lowered thereby causing the said premises (of the plaintiff) to sink and its walls to move from its original position and the premises has been damaged."

The appellant delivered a defence denying liability. The learned trial judge found the appellant liable for actionable nuisance and gave judgment for the respondent. The appellant appealed. On the appeal, learned counsel for the appellant contended that the main issue in the case was a question of negligence. It was submitted that the parties were bound by their pleadings and since nuisance was not specifically pleaded, the appeal should be allowed.

**Held**: (Seah S.C.J. dissenting): in this case learned counsel for the respondent said that the cause of action is founded on the natural right of support. That in the context of the present case is the same as saying that the claim is based on nuisance. In any event it is clear that the appellant was not caught by surprise and his defence was in answer to what was alleged in the statement of claim. There was no conceivable prejudice to the appellants that the word "nuisance" had not been expressly set out in the statement of claim.

*Cases referred to:*

(1) *Janagi* v. *Ong Boon Kiat* [1971] 2 M.L.J. 196.
(2) *Chartered Bank* v. *Yong Chan* [1974] 1 M.L.J. 157.
(3) *Leakey & Ors.* v. *National Trust for Places of Historic Interest or Natural Beauty* [1980] 2 W.L.R. 65
(4) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] A.C. 218.
(5) *Farrell* v. *Secretary of State* [1980] 1 All E.R. 166, 173.
(6) *Hadmor Productions* v. *Hamilton* [1983] 1 A.C. 191, 233.
(7) *Burns* v. *Dixon's Iron Works Ltd.* [1961] S.C. 102, 107-108.
(8) *John G. Stein Co. Ltd* v. *O' Hanlon* [1965] A.C. 890, 909.
(9) *Waghorn* v. *George Wimpey Co. Ltd.* [1969] 1 W.L.R. 1764.
(10) *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy* [1964] M.L.J. 99.

SUPREME COURT.

*K.C. Tee* for the appellant.

*T. Thomas* (*Dato Lee Boon Peng* with him) for the respondent.

*Cur. Adv. Vult.*

**Wan Suleiman S.C.J.**: The appellant who was defendant in the High Court is a company incorporated in Malaysia under the Companies Act 1965 with registered office at No. 76, Jalan Lemon, Seremban, Negeri Sembilan and the respondent/plaintiff (plaintiff in the court below) is a medical practitioner who carries on his practice at No. 26, Jalan Tuan Sheikh, Seremban. Both appellant and the respondent are the registered owners of adjoining landed properties in the township of Seremban. As a result of development works carried out on the appellant's land, the respondent on December 26, 1980 took out a writ against them claiming *inter alia*, damages and also prayed for an injunction. The appellant delivered a defence denying liability. The learned trial judge found the appellant liable for actionable nuisance and gave judgment in favour of the respondent.

It is common ground that the case against appellant is summed up in paragraph 8 of the Statement of Claim filed by the respondent/plaintiff which reads as follows:

"The indiscriminate excavation and removal of earth, stone and clay from the defendants' property without ensuring sufficient support for the adjoining properties and without taking sufficient precautions and providing adequate support or otherwise has caused the surrounding areas to be lowered thereby causing the said premises (of the plaintiff) to sink and its walls to move from its original position and the premises has been damaged."

Learned counsel for the appellant/defendant contends that the main issue here is a question of negligence, drawing our attention to paragraph 8 of the statement of claim set out above.

In his written submission submitted to the learned trial judge (pages 105/106 of Part I of the Appeal Record) he complained in these terms:-

"The pleadings in paragraph 8 of the Statement of Claim need a lot of examination and despite that it is difficult to see what is the actual cause of action that the plaintiff is relying on. It appears that there are two issues here namely

i) that the defendant did not protect the plaintiff's right of support; and

ii) that the defendant was allegedly negligent.

Before us he referred to the reply to this by the respondent/plaintiff (at page 122 of the same volume of the Record). There learned counsel for the respondent conceded that the cause of action is founded on the natural right of support.

Looking at the Grounds of Judgment of the learned trial judge it is clear that he regarded the claim to be one of nuisance *i.e.* physical damage to adjoining land.

Perhaps it will be more useful to set out *in extenso* that part of his judgment (pages 180 to 182):

"The damage to the plaintiff's land in this case, I find, is the subsidence of such land due to defendants' construc-

tional or piling or excavation operations. It is settled that an owner of land has a right to the support of his land in its natural state by and from the adjacent land as distinct from a right of support for buildings about which no such right exists in common law. The damage complained of is to the building in regard to those extensive cracks and the tilting wall in question, it is damage for which the defendants would have to accept responsibility, because the damage to the building was caused by the subsidence of land, due to defendants' actions on their land even though there is no natural right of support for buildings in common law. It was not due to weight of the plaintiff's building with such weight causing such subsidence. In this connection, I specifically reject the suggestion of DW 1 that subsidence was caused because the space between the bottom of the ground floor of the plaintiff's building and its foundation was merely filled with earth. Having regard to the time those cracks appeared and the time the defendants started their operations, subsidence could not have been caused by the weight of the plaintiff's building as DW 1's evidence seemed to suggest. (Please see *Brown* v. *Robins* ((1859) 157 E.R. 809) recoverability of damages for injury to buildings in these circumstances).

The defence of the defendants in this case appears to be that they have exercised all reasonable care, caution and skill. Thus, defendants have adduced evidence of soil investigation, subsequent sinking of piling sheets, placing wedge of earth on them *etc.* Examination and cross-examination of witnesses and submission from both parties were invariably or almost exclusively directed to the causes of the subsidence and the consequential settlement. Would this defence really absolve the defendants from liability in nuisance, even if it is established?

In my view, negligence is not an essential element in action for nuisance of the kind concerned here. A plaintiff does not have to prove any negligence to establish this kind of nuisance, all that is necessary is proof of special damage, *i.e.* the subsidence, settlement and the damage to his building being due to the actions of the defendants on the adjoining land. The defence as relied on, will be a most relevant defence to an action for negligence, but the fact that the defendants have exercised all reasonable care and caution is no defence to an action of the kind here."

For the appellant it was submitted that parties are bound by their pleadings, and since nuisance was not specifically pleaded, the appeal should be allowed.

Two authorities cited by counsel needs special attention.

In *Janagi* v. *Ong Boon Kiat*[1] the plaintiff sued defendant for repayment of a sum of money on a promissory note executed by the defendant. The plaintiff admitted that she was a licensed moneylender. Defendant denied having borrowed any money from the plaintiff but admitted having taken a loan from a man whose name he was unable to furnish. The learned Magistrate without taking any evidence from the plaintiff or her witness, began to record a sworn statement from the defendant only in answer to questions put by him. The plaintiff was not allowed to cross-examine the defendant. On the evidence then recorded the learned Magistrate found that the defendant could not read, write or converse in English, and the promissory note could not be used as a basis for plaintiff's claim which he therefore dismissed. This order was made despite the fact that the defendant never raised any plea that the plaintiff had not complied with any of the provisions of the Moneylenders Ordinance.

There Sharma J. rightly held that the trial of a suit should be confined to pleas on which parties are at variance.

Next we were referred to the *Chartered Bank* v. *Yong Chan.*[2] The facts there are as follows: The respondent had drawn a cheque on the partnership account with the appellant bank. The partnership had been dissolved and under the terms of dissolution the respondent was given authority to wind-up the partnership business and he continued to operate the partnership account. Subsequently, one of the former partners wrote to the bank asking the bank to stop withdrawals unless authorised by all three partners. When notified of this letter, the respondent objected to it. Subsequently, the respondent issued a cheque which was returned dishonoured with the answer "signature of all partners required." More than two years later the respondent issued a writ and on the pleadings based his claim on libel. The learned trial judge held that the action based on libel was statute-barred by virtue of the Sabah Limitation Ordinance. He, however, awarded a sum of $1,000 by way of damages for breach of contract.

There being nothing in the pleading to include a claim for breach of contract, the Federal Court held that the trial judge had decided on an issue not raised in the pleading and accordingly set aside the judgment and ordered a new trial.

The latter course of action was suggested by counsel for the appellant as the one we should take, *i.e.* that the appeal should be allowed and a new trial ordered.

Mr. T. Thomas for the respondent whilst conceding that the statement of claim was not ideal yet maintained that the learned judge was nevertheless correct and cited as his authority *Leakey & Ors.* v. *National Trust For Places of Historic*

*Interest or Natural Beauty*.[3] There it was held *per curiam* that even though the action was properly brought in nuisance rather than in negligence the distinction is of no practical significance.

He added that whilst paragraph 8 of the statement of claim earlier set out has resulted in submissions which were largely directed towards negligence, in the court below, the facts of the case which showed negligence would also show nuisance, and because of his contention that the principles in *Leakey's* case are applicable here, I propose to deal with that decision at some length.

For the facts it will be sufficient for me to set out the headnote:

"The plaintiffs' two houses had been built to the west and at the foot of a large mound on the defendants' land. Over a period of many years, soil and rubble had fallen from the bank of the mound on to the plaintiffs' lands. The falls were due to natural weathering and the nature of the soil. From 1968 at the latest, the defendants knew that the instability of their land was a threat to the plaintiffs' properties because of the real possibility of falls from it of soil and other material. After a very dry summer followed by a wet autumn in 1976, a large crack opened in the mound above the house of the first two plaintiffs. They drew the defendants' attention to the danger to their house from a major fall of soil, but the defendants replied that, as it was a natural movement of land, they had no responsibility for any damage caused. A few weeks later, a large quantity of earth and some tree stumps fell from the bank on to the plaintiffs' land. The plaintiffs brought an action in nuisance claiming orders for abatement of the nuisance and damages. In interlocutory proceedings, the defendants were ordered to carry out the necessary work to abate the nuisance, the plaintiffs giving undertakings as to damages. On the trial of the action, O'Connor J. held that the defendants were liable to the plaintiffs in nuisance and awarded the plaintiff damages. The Court of Appeal dismissed the appeal lodged by the defendants."

Then we were referred to a passage (at pages 74/75) in the judgment of Megaw L.J., in the Court of Appeal which reads as follows:

"It is convenient at this stage to deal with the second proposition put forward by the defendants in the present appeal. The plaintiffs' claim is expressed in the pleadings to be founded in nuisance. There is no express reference to negligence in the statement of claim. But there is an allegation of a breach of duty, and the duty asserted is, in effect, a duty to take reasonable care to prevent part of the defendants' land from falling on to the plaintiffs' property. I should, for myself, regard that as being properly described as a claim in nuisance. But even if that were, technically, wrong, I do not think that the point could or should avail the defendants in this case. If it were to do so, it would be a regrettable modern instance of the forms of action successfully clanking their spectral chains; for there would be no conceivable prejudice to the defendants in this case that the word 'negligence' had not been expressly set out in the statement of claim. The suggestion that if it had been so pleaded the defendants could have raised a defence of volenti non fit injuria, which they could not raise as against a claim pleaded in nuisance, is, in my judgment, misconceived. As counsel for the plaintiffs submitted, while it is no defence to a claim in nuisance that the plaintiff has 'come to the nuisance,' it would have been properly pleadable defence to this statement of claim that the plaintiffs, knowing of the danger to their property, by word or deed, had showed their willingness to accept that danger. Moreover, I find it hard to imagine circumstances in which the facts which would provide a defence of *volenti non fit injuria* would not also provide a defence in a case such as the present in the light of the scope of the duty which falls to be considered hereafter."

There, as in the instant appeal, the difference between nuisance and negligence, it is submitted, is unimportant.

I agree with him, and whilst I would say that the authorities cited on behalf of the appellant were correctly decided on their particular set of facts, it matters not whether in this particular appeal before us nuisance was specifically pleaded or not.

As has been indicated earlier learned counsel for the respondent said that the cause of action is founded on the natural right of support. That, in the context of the present case is the same as saying that the claim is based on nuisance. In any event it is clear beyond per adventure that the appellant/defendant was not caught by surprise and his defence was in answer to what was alleged in the statement of claim. To paraphrase *Leakey's* case I can see no conceivable prejudice to the defendants in this case that the word "nuisance" has not been expressly set out in the statement of claim.

I would therefore dismiss this appeal with costs here and below.

**Seah S.C.J.** (dissenting): The appellant (defendant at the High Court) are a company incorporated in Malaysia under the Companies Act 1965 with registered office at No. 76, Jalan Lemon, Seremban, Negri Sembilan and the respondent (plaintiff in the Court below) is a medical practitioner who carries on his practice at No. 26, Jalan Tuan Sheikh, Seremban. Both the appellant and the respondent are registered owners of adjoining landed properties in the township of Seremban. As a result of development works being carried out on the appellant's land the respondent on December 26, 1980 took out a writ against them claiming *inter alia*, damages and injunction. The appellant delivered a defence denying liability. After consi-

dering the evidence and the written submissions the learned judge found the appellant guilty of actionable nuisance and gave judgment in favour of the respondent together with damages in the sum of $96,151.00 as well as cost. The appellants are dissatisfied with this decision and have appealed to this court.

It was common ground that the case against the appellant was contained in paragraph 8 of the statement of claim filed by the respondent which reads:

"The indiscriminate excavation and removal of earth, stone and clay from the defendants property without ensuring sufficient support for the adjoining properties and without taking sufficient precautions and providing adequate support or otherwise has caused the surrounding areas to be lowered thereby causing the said premises (of the plaintiff) to sink and its walls to move from its original position and the premises has been damaged."

It is apparent from this paragraph and the form of pleading that the respondent sought to establish and the case that the appellant had to meet was based on alleged negligent acts of the appellant and/or their agents resulting in loss of support and damage. The learned judge found that negligence had not been established by the respondent and since there was no alternative claim he ought to have dismissed the action with costs to the appellant. Instead the learned judge proceeded to consider and held that the appellant was guilty of actionable nuisance and gave judgment in favour of the respondent purporting to rely on a claim which had not been raised by the pleadings. It would be an understatement to say that both learned counsel for the appellant and the respondent were taken by surprise at this turn of event which was totally unexpected.

I think this is an appropriate occasion on which to reiterate that the function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. The defendant is entitled to conduct the case and confine his evidence in reliance upon the further and better particulars contained in paragraph 8 of the statement of claim. The purpose of such particulars is to define the issues and to indicate to the opposing party how much range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and tends to reduce costs. But if any appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system [*Esso Petroleum Co. Ltd.* v. *Southport Corporation*[4] particularly the judgment of Lord Radcliffe].

Despite Order 20 rule 5 of the Rules of the High Court 1980 and the progress which I discern to have been made following these changes by the High Court I would like to quote what Lord Edmund-Davies said in the case of *Farrell* v. *Secretary of State*[5]:

"It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to pay an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it."

Words to the same effect were also uttered by Lord Diplock in *Hadmor Productions* v. *Hamilton*[6]:

"Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right of each to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is . . . . "

To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded [see Lord Normand's judgment in *Esso* case (*supra*) at page 239].

I would adopt the cautions expounded in these judgments in dealing with appeals when the trial court decided on a material point of law which was neither pleaded, expressly or by necessary implication unless the successful party could bring his case within the test formulated by Lord Justice-Clerk Thomson in *Burns* v. *Dixon's Iron Works Ltd.*[7] *viz:*

"The court is often charitable to records and is slow to overturn verdicts on technical grounds. But when a pursuer fails completely to substantiate the only grounds of fault averred, and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred but is something which is new, separate and distinct, we are not in the realm of technicality."

This *dictum* was cited with approval by Lord Guest in the House of Lords in the case of *John G. Stein Co. Ltd.* v. *O'Hanlon*[8] and by Geoffrey Lane J. (as he then was) in *Waghorn* v. *George Wimpey Co. Ltd.*[9]

It seems to me that the test used by Lord Justice Clerk Thomson is an elaboration of the Second limb of Order 18 Rule 15(2) of the Rules of the High Court 1980 which reads:

". . . . . a plaintiff may in his statement of claim alter, modify or extend any claim made by him in the endorsement of the writ without amending the indorsement."

Learned counsel for the respondent had made no attempt to bring his case within this rule.

I am clearly of the opinion that action framed on nuisance ought to be distinctly and expressly pleaded in the statement of claim in order to give to the defendant a fair notice to meet it. *A fortiori*, the pleadings ought to specify whether or not negligence is to be relied upon to establish it. In my opinion, if the respondent's case were put in the alternative in this manner, the proceedings would no doubt have been developed on wholly different lines. The ambit of discovery would have been enlarged and it is idle to speculate what would have happened if such a case had been made out.

Be that as it may, having regard to the issue raised in the pleadings and the state of the case law on actionable nuisance, in my opinion, it was not open to the learned judge to give judgment in favour of the respondent based on legal nuisance – a cause of action which was neither pleaded, expressly or by necessary implication. Nor was it referred to in the written submissions by both learned counsel.

In such circumstances, the proper order would be to allow the appeal, set aside the judgment of the learned judge and order a new trial before another judge to be founded on nuisance only after the necessary amendments to the statement of claim and defence have been made [see *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy*[10] and *The Chartered Bank* v. *Yong Chan*[2]]. In the exercise of my discretion, I award costs to the appellant in this appeal only to be taxed and that there is no order as to costs in the court below. The deposit to be refunded to the appellant.

**Wan Hamzah S.C.J.** : I have had the opportunity of reading the judgments in draft of my learned brothers Tan Sri Dato Wan Suleiman and Dato George K.S. Seah. With due respect I agree with Tan Sri Dato Wan Suleiman that the appeal should be dismissed with costs. In my opinion averment of nuisance can be perceived from the allegations of the facts contained in the Statement of Claim although the word "nuisance" is not stated.

*Appeal dismissed.*

Solicitors: *Shearn Delamore & Co.; Lee Boon Peng & Co.*

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## LAU CHUN TSAO & ORS. v. SOO CHAI

**[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) April 30 & October 18, 1986]**

**[Kota Kinabalu – Supreme Court Civil Appeal No. 416 of 1985]**

*Land law – Specific performance – Whether transfer executed by contracting party in favour of third person can be cancelled – R.H.C. 1980, O. 81 – Specific Relief Act, 1950, ss. 26(b) & 36.*

In this case the first appellant a housing developer had entered into an agreement to sell a building lot to one Chan Kon Foh. Subsequently the first appellant sold all his interests in the housing estate to the 2nd appellant. Later a substituted agreement was entered into between Chan Kon Foh, the respondent and the 1st appellant whereby Chan Kon Foh assigned all his rights and interests in the building lot to the respondent.

However, the 2nd appellant transferred the building lot to his wife, the 3rd appellant, and she charged the land to the Sabah Bank Bhd. The respondent applied for an order that the transfer of the land by the 2nd appellant to the 3rd appellant was void and should be cancelled under section 36 of the Specific Relief Act, 1950. The learned trial judge gave summary judgement in favour of the respondent and the appellants appealed.

**Held**: (1) section 36 of the Specific Relief Act, 1950, does not empower the learned judge to order the cancellation of the transfer executed by the second appellant to the 3rd appellant;

(2) the Court appears to have the jurisdiction and power to make such an order under section 26(b) of the Specific Relief Act, 1950, but it should only do so after a trial and subject to the conditions contained therein;

(3) the order of the learned Judge should be set aside and leave be given to the appellants to defend the action.

*Case referred to:*

(1) *Ong Chat Pang & Anor.* v. *Valliappa Chettiar* [1971] 1 M.L.J. 224.